

Exemptions  
Individual Retirement Account  
Conversion to exempt property

Sticka v. Vosberg  
In re Vosberg

Appellate # 99-6099-HO  
Case # 698-65081-fra7

7/7/99

Dist. Court (Hogan) aff'g Unpublished  
order of FRA

Debtors filed a claim of exemption in IRA accounts established for each debtor in the amount of \$2,000. Debtors sold non-exempt stock and transferred the money to the exempt IRA's on the advice of counsel. The Trustee objected on the ground that the transfer was a fraud on creditors and the bankruptcy court denied the Trustee's objection.

Both sides conceded that the purchase of the IRA's was a "permitted contribution" for purposes of the state exemption at ORS 23.170(1)(c). The Trustee asked the court to go one step further to analyze whether the transfer was fraudulent. The District Court agreed with the Bankruptcy court that the statutory framework does not allow the court to do so. The statute says that a contribution, other than a permitted contribution, shall be subject to state fraudulent transfer law. Since both sides conceded that the contribution was a "permitted contribution," the court could not reach the fraudulent transfer analysis. Even if the court could reach such an analysis, the Trustee had presented insufficient evidence to permit a finding that the transfer was fraudulent.

E99-16(5)

There was no underlying  
written opinion of the bankruptcy court

FILED

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DISTRICT OF OREGON

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CLERK U.S. DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE, OREGON

BY \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

RONALD R. STICKA, Trustee,	)	
	)	
Appellant,	)	Case No. 99-6099-HO
	)	
v.	)	ORDER
	)	
MICHAEL GARNET VOSBERG and	)	
REBECCA BRIANNE VOSBERG,	)	
	)	
Appellees.	)	
_____	)	

Appellant Sticka ("trustee") brings this action pursuant to 28 U.S.C. § 158(a)(1) to appeal the bankruptcy court's order denying his objection to claims of exemptions for individual retirement accounts ("IRA's") established by debtor-appellees Michael and Rebecca Vosberg ("debtors").

Factual and Procedural Background

This case arises from a Chapter 7 bankruptcy petition filed by debtors on August 28, 1998. Trustee-appellant is the duly appointed Chapter 7 trustee. Debtors filed claims

of exemption under Oregon Revised Statute 23.170 for IRA accounts established for each debtor with deposits of \$2,000 each, resulting from a sale of stock. The transfer allegedly occurred three months prior to the first creditors meeting. Debtors concede that they had regularly been contributing to 401(k) plans aggregating \$250,000 at the time of bankruptcy, and that they sold the stock and purchased the IRA's upon the advice of counsel.<sup>1</sup>

Trustee filed an objection to the claim of exemption for the IRA accounts, alleging that the non-exempt stock was sold to purchase the IRA accounts in an effort to shield the non-exempt funds from creditor claims. Debtors requested a hearing, and the matter was considered on January 6, 1999. At the hearing, the Honorable Frank R. Alley III denied trustee's objections. An order was entered on January 13, 1999. Trustee has timely filed an appeal.

#### Standard of Review

The district court reviews a bankruptcy court's finding of fact under the clearly erroneous standard, and reviews conclusions of law de novo. See In re Lazar, 83 F.3d 306, 308 (9th Cir. 1996).

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<sup>1</sup> Although debtors were not present at the hearing and, thus, no evidence was presented as to the debtors' intent, debtors acknowledge in their briefing before the Bankruptcy Court that they had acted upon the advice of counsel in purchasing the IRA's.

### Discussion

We are asked only to determine whether the Bankruptcy Court erred in determining that debtors properly claimed an exemption in IRA funds. Because Oregon has opted out of the pertinent federal legislation, we must look to state law to make this determination.

Oregon Revised Statute 23.170 (1)(c)<sup>2</sup> defines what is a "permitted contribution." Both parties concede that the purchase of the IRA's was a permitted contribution under subsection (1)(c)(C)<sup>3</sup>.

Trustee asks us to go one step further and analyze whether the transfer was ~~fraudulent~~. As was correctly found by the Bankruptcy Court, the statutory framework does not

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<sup>2</sup> This court notes the numerous amendments and changes in numerical designations of this statute. See endnote to Or. Rev. Stat. § 23.170 (1997) (noting that "[u]ntil December 31, 2001, 23.170 is not operative,"; Section 146, chapter 746, Oregon Laws 1997, "operates in lieu" of section 23.170 until December 31, 2001). Regardless of the proper designation as was in effect for purposes of this bankruptcy petition, the portion of the statute relevant for this appeal has remained unchanged, and the court will refer to the statute as section 23.170 as did the Bankruptcy Court. See also Wilbur v. Sticka, 126 F.3d 1218 (9th Cir. 1997) (referring to section 23.170).

<sup>3</sup> Under subsection (1)(c)(C), a "permitted contribution" includes "deductible or nondeductible contribution[s] to an individual retirement account to the extent the contribution is not subject to federal excise tax as an excess contribution."

The Bankruptcy Court expressed its willingness to revisit this issue if debtor's future tax return indicates that the contribution is not a "permitted contribution" under this subsection. The Bankruptcy Court requested that debtors provide trustee with the tax return when filed.

allow the court to do this under these circumstances.

Rather, subsection (3)(a) provides:

A contribution to a retirement plan, other than a permitted contribution, shall be subject to ORS 95.200 to 95.310 concerning fraudulent transfers . . . .

Or. Rev. Stat. § 23.170(3)(a) (emphasis added).

As pointed out by the Bankruptcy Court in its oral ruling, the statute does not dictate that a non-permitted contribution is *per se* fraudulent; but rather, it only says that an action will lie if it is not a permitted contribution. The Bankruptcy Court correctly interpreted by negative inference that the statute does not provide for a fraudulent transfer action if the contribution is a "permitted contribution" under the statute. Because both sides concede that the contribution was a "permitted contribution," the court may not reach the fraudulent transfer analysis.

Although trustee urges the court to consider the public policy of protecting creditors, and thus, to reach the fraudulent transfer issue, that is not the job of the court when the state legislature has spoken. Accordingly, the Bankruptcy Court did not err when it overruled trustee's objections on the narrow grounds that the status of the property was consistent with the Oregon exemption statutes.


The court further notes that even if it were compelled

to engage in a fraudulent transfer analysis, trustee presented insufficient evidence to find that the transfer was fraudulent. See In re Beckman, 104 B.R. 866, 870 (Bankr.S.D.Ohio 1989) ("The general rule which has emerged from the decisional law is that mere conversion of property from nonexempt to exempt status on the eve of bankruptcy does not establish fraud."); cf. In re Summers, 85 B.R. 121, 126 (Bankr.D.Or. 1988) ("Generally, a debtor's conversion of nonexempt property to exempt property on the eve of bankruptcy is not fraudulent per se. (Citations omitted). Extrinsic evidence of fraud must be present to invalidate the exemption.").

#### CONCLUSION

For the foregoing reasons, the decision of the Bankruptcy Court is affirmed.

DATED this 6<sup>th</sup> day of July, 1999.

  
UNITED STATES DISTRICT JUDGE

FILED

*Entered*

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CLERK U.S. DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE, OREGON

*[Signature]*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

RONALD R STICKA, Trustee

Appellant,

v.

Civil No. 99-6099-HO

MICHAEL GARNET VOSBERG,  
REBECCA BRIANNE VOSBERG

Appellees.

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JUDGMENT

The decision of the Bankruptcy Court is affirmed.

Dated: July 8, 1999.

Donald M. Cinnamond, Clerk

by *[Signature]*

Lea Force, Deputy

JUDGMENT

DOCUMENT NO: \_\_\_\_\_

*[Signature]*